

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89-553

ROBERT C. GUCCIONE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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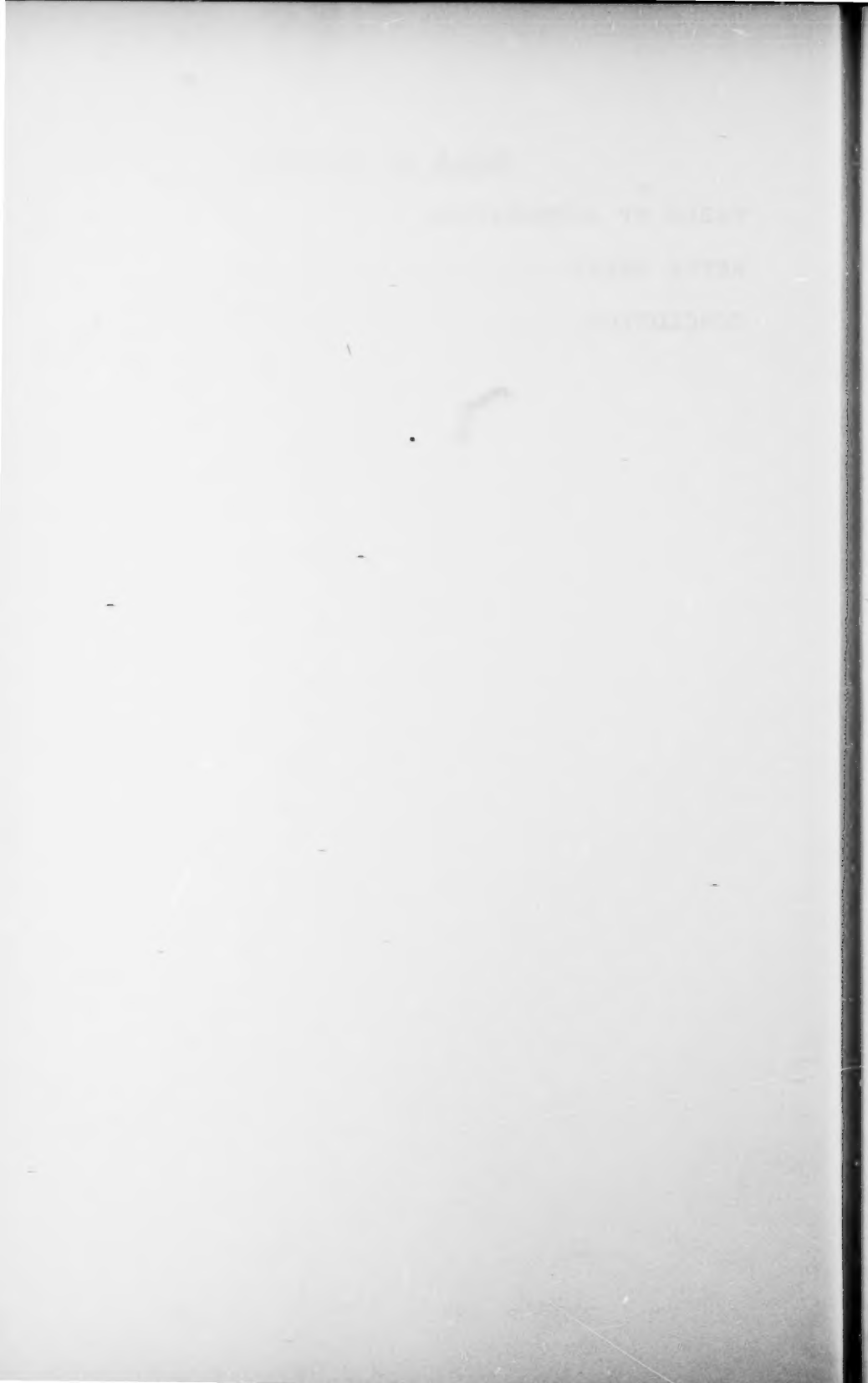


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REPLY BRIEF

This case presents the important question - whether the FBI can be held accountable for damages its operative caused during "ABSCAM" when that operative targeted and injured an innocent victim who refused to become involved in the illegal activity of the scam. Congress specifically condemned the government's handling of the operation and the harm it caused Petitioner Robert Guccione.

Petitioner submits this reply brief because, either unintentionally or by design, the United States has beclouded what is at issue in this case. Although it fairly states the "Question Presented," its brief hardly addresses that question at all.

The issue presented by this case is not whether Weinberg was technically an "employee of the Government" for purposes of the Federal



Tort Claims Act ["FTCA"].¹ Whether Weinberg was or was not an "employee," the case presents the question of whether the FBI's negligent supervision of him is actionable

¹Petitioner, citing the Department of Justice's own guidelines on the use of informants and confidential sources (Pet. 2), submits that Weinberg was not an employee of the government. The United States takes the position, in this Court, that Weinberg was a government employee. Neither the district court nor the Court of Appeals resolved this factual issue. It is not a question presented by this Petition and could not be resolved on this record.

The government disingenuously asserts that Petitioner's own pleadings establish that Weinberg was an employee of the government for purposes of the FTCA. (Brief in Opposition 6,8,9) They do no such thing. While Petitioner's complaint alleged that the FBI "employed or otherwise engaged Melvin Weinberg to assist in the [ABSCAM] investigation" (Compl. ¶5, C.A. App.9), the allegation did not purport to state a legal conclusion as to Weinberg's employment status under the FTCA. Rather, employing plain English, the complaint employed "employed" as a synonym for "used."

In any event the United States declines to mention that, in its own answer to the complaint, it expressly denied the allegation that the FBI "employed" Weinberg to assist in the investigation. (Answer ¶5, C.A. App. 17).
(footnote continued)

under the FTCA. Under either alternative, the case presents a question meeting the criteria for review by this Court.

Where the negligently-supervised intentional tortfeasor is not a government employee, it had long been settled that the intentional tort exception was no bar to suit, at least until the Second Circuit decided the instant case. This was the rule of Panella v. United States, 216 F.2d 622 (2d Cir. 1954), and its progeny, and Sheridan v. United States, 108 S.Ct. 2449 (1988), confirmed its

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The facts relating to Weinberg's peculiar relationship with the government are matters largely within the knowledge of the government, not the Petitioner. The precise status vis-a-vis the government of someone like Weinberg who acts as an informant and undercover operative cannot be determined without development of a full factual record through discovery and trial. In this case, the government resisted all discovery and, facing sanctions for non-compliance, moved for summary judgment. Summary judgment was granted, precluding development of the factual record.

Record.

correctness. The decision of the Second Circuit revisits Panella, rewrites it, and repudiates that rule. Given the patent conflict with Sheridan, this question itself is worthy of this Court's review.

Also worthy of review is the equally important, but more difficult question of when there is liability under the FTCA for negligent supervision by a federal employee of another government employee who commits an intentional tort. The government concedes that Sheridan v. United States, 108 S.Ct. 1449 (1988), leaves this important issue partially unresolved. It argues, however, that this case is an unsuitable vehicle for reaching that question because of the fact-bound disagreement between the parties concerning whether Weinberg was or was not a government employee for purposes of the FTCA. (Brief for the United States in Opposition at 6) This is



an incredible argument for the government to make to this Court in light of its other assertion that this case does not merit review because, on the basis of Petitioner's own pleadings, Weinberg must be deemed an employee of the government. It is also an argument which the government may not logically make because it is only if Weinberg is assumed to be a federal employee that any genuine question as to the government's immunity from suit arises.

Putting aside the obscuring rhetoric, this mixed case involving both intentional and negligent conduct squarely presents important questions which merit review by this Court, even on the government's assumption that Weinberg was a federal employee for purposes of the FTCA.

The broad question is under what circumstances there is liability under the FTCA for negligent supervision of a government employee who commits an intentional tort. Specifically, is a claim for negligent supervision barred under the intentional tort exception if the intentional tort is "work-related," as the Second Circuit has held.²

²A typographical error in the first full paragraph of page 35 of the Petition renders Petitioner's argument on this point less clear than it should be. Petitioner argued that the Second Circuit erred in asking whether the intentional tort was "work-related" and ruling that suit was barred because Weinberg's acts were "work-related." Petitioner argues that, under Sheridan, no cause of action is barred by the intentional tort exception if the cause of action would not have been actionable under the general waiver of sovereign immunity. Thus, a suit arising out of the intentional tort of a non-employee is not barred by the intentional tort exception because such a claim would not be actionable under the FTCA's general waiver of immunity. Likewise, an intentional tort by an off-duty serviceman or an intentional tort by a government employee acting outside the scope of his employment are not within the intentional tort exception, because they are not within the general waiver of immunity; nothing in the FTCA could give

(footnote continued)



The case also presents the question whether the Second Circuit erred in holding that claims for negligent supervision by federal employees are not actionable because federal supervisory personnel owe no duty of care to persons who may be injured by those they are supposed to supervise.³ On these questions,

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rise to liability on the part of the government in those situations. The Petition should read:

That [asking whether the intentional tort was "work-related"] is not an appropriate stand-in for employee/non-employee; on-duty/off-duty; or within-the-scope of employment/outside-the-scope of employment because it does not make the necessary distinction. It does not permit one to answer the question whether, putting aside the exception, the government would otherwise be liable for the tortious conduct.

Instead of reading "employee/non-employee" the petition, at page 35, erroneously read "employer/employee."

³Under the FTCA, duty of care is a question of state law. Petitioner submits that, under
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the government's brief in opposition simply reiterates the decision of the Court of Appeals, the decision as to which the Petitioner seeks review.

As demonstrated in the Petition for Certiorari, that decision is in conflict with this Court's recent ruling in Sheridan. Sheridan not only confirms the long-settled rule that the intentional tort exception has no applicability where the intentional tortfeasor is not a government employee. Sheridan also establishes that, where the intentional tortfeasor is a government employee, suit will not be barred under the intentional tort exception where, under the FTCA's general waiver of sovereign immunity, the intentional tortfeasor's acts would not have given rise to governmental liability.

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state law, the FBI did owe a special duty of care to Guccione. See 2 Restatement of the Law of Torts, 2d §§ 317, 321.

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Where the intentional tortfeasor's act is the act of an off-duty serviceman, as in Sheridan, or is an act outside the scope of employment, then the intentional tort exception is no bar to suit.⁴ Sheridan also expressly leaves open the question whether, in general, negligent supervision of a government employee is actionable under the FTCA.⁵

⁴The government's repeated insistence that Petitioner himself has alleged that Weinberg was "under the control and supervision" of the FBI does not mean that Weinberg was acting within the scope of his employment. See, e.g., Rounds v. Delaware, Lackawanna & Western RR Co., 64 N.Y. 129 (1876); Oneta v. Paul Tocci, Co., 271 A.D. 681, 67 N.Y.S.2d 795 (1st Dept.), aff'd, 297 N.Y. 629, 75 N.E.2d 743 (1947). Those allegations were necessary components of Petitioner's claim that the negligence of Weinberg's supervisors was the cause of Petitioner's injuries.

⁵The government's attempt to distinguish the Ninth Circuit cases is misguided. Those cases stand for the proposition, rejected by the Second Circuit, that the intentional tort exception does not bar a suit against the United States based on the negligent supervision of an employee that proximately results in an intentional tort and injury to another. That the cases do not use precisely
(footnote continued)

The government boldly asserts that the Second Circuit's decision is consistent with the legislative history of the FTCA. Petitioner submits that it is not. Through the intentional tort exception, Congress intended to preserve sovereign immunity where the claimant attempts to impose liability on the government for an intentional tort, either directly or on the theory of respondeat superior. Congress, though, through enactment of the FTCA, affirmatively acted to waive government immunity where liability arises out of the negligence of government employees. This case is in the latter category.

In this specific case, Congress has expressed its concern about illegal conduct of an FBI operative, negligent mismanagement by the FBI, and the serious financial injury

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the same language used in Petitioner's
complaint does not undermine this basic point.

adamant refusal to commit illegal acts himself. This case is thus a particularly appropriate vehicle for resolving the legal questions it squarely presents.

CONCLUSION

Petitioner respectfully prays that the
Writ of Certiorari be granted.

Respectfully submitted,

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